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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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IN THE

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Petitioners,

—v.—

CITY OF BIRMINGHAM

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioners pray that writ of certiorari issue to review the judgments of the Alabama Court of Appeals entered in the above entitled cases as set forth in "Jurisdiction," *infra.*

Citation to Opinion Below*

The opinion of the Alabama Court of Appeals is not reported, and is set forth in the Appendix hereto *infra* p. 4a. The denial of certiorari by the Supreme Court of Alabama is unreported and appears in the Appendix; *infra,* p. 22a.

*The Appendix contains the following opinions and orders in *Gober*: Judgment; Opinion of Alabama Court of Appeals; Judgment, Alabama Court of Appeals; Denial of Rehearing, Alabama Court of Appeals; Denial of Certiorari, Supreme Court of Alabama; Denial of Rehearing on Petition for Writ of Certiorari, Supreme Court of Alabama. All other cases were affirmed on authority of *Gober*. Pertinent orders and opinions are set forth for the *Westmoreland* case; all the orders and opinions in the other cases are identical and, therefore, are omitted.

Jurisdiction

The judgments of the Alabama Court of Appeals were entered on May 30, 1961 (Gober 57, Davis 60, Hutchinson 42, King 42, Parker 45, West 41, Sanders 36, Westmoreland 33, Walker 36, Willis 33); Appendix p. 13a *infra*. Petitions to the Supreme Court of Alabama for Writs of Certiorari were denied on September 14, 1961 (Gober 72, Davis 67, Hutchinson 47, King 48, Parker 46, West 50, Sanders 42, Westmoreland 38, Walker 43, Willis 39), *infra*, p. 15a.

Applications to the Supreme Court of Alabama for rehearing were overruled on November 2, 1961 (Gober 74, Davis 69, Hutchinson 49, King 50, Parker 48, West 52, Sanders 44, Westmoreland 40, Walker 45, Willis 41), *infra*, p. 16a.

The jurisdiction of this Court is invoked pursuant to United States Code 28, Section 1257(3), petitioners having asserted below, and asserting here, the deprivation of their rights, privileges, and immunities secured by the Constitution of the United States.

Questions Presented

Whether Negro petitioners were denied due process of law and equal protection of the laws secured by the Fourteenth Amendment:

1. When arrested and convicted of trespass for refusing to leave department stores' dining areas where their exclusion was required by an Ordinance of the City of Birmingham which orders segregation in eating facilities.

2. By conviction of trespass for refusal to leave whites-only dining areas of department stores in which all persons are otherwise served without discrimination.

3. When arrested and convicted of trespass for seeking nonsegregated food service at whites-only dining areas upon records barren of evidence that any person making the requests to leave identified his authority to make the request.

4. Whether petitioner sit-in demonstrators were denied freedom of expression secured by the Fourteenth Amendment when arrested and convicted for trespass upon refusal to move from whites-only dining areas where the managers did not call the police or sign any affidavit or warrant demanding prosecution and were apparently willing to endure the controversy without recourse to criminal process.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following sections of the City Code of Birmingham, Alabama:

> "Section 1436 (1944), *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.
>
> Section 369 (1944), *Separation of races.* It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor

upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, Section 5288).

Statement

These are ten sit-in protest cases tried in five separate trials.[1] The protests—involving common facts relevant to the Constitutional issues here presented—occurred the same day in five department stores in each of which two petitioners were arrested and charged with commission of the same acts; all were sentenced identically in a common sentencing proceeding (Gober 52-56, Davis 51-55; Hutchinson 34-38, King 34-38; Parker 36-40, West 33-37; Sanders 28-32, Westmoreland 25-29; Walker 28-32, Willis 25-29)[2] after trials held *seriatim* with the same judge, prosecution, and defense counsel. Identical constitutional and state law questions were raised in each case. See *infra*, pp. 14-18. The Alabama Court of Appeals wrote an affirming opinion for the first case, *Gober* v. *State of Alabama*, see *infra*, p. 4a, affirming all others in brief *per curiam* orders merely citing *Gober*, see *infra*, p. 20a. The Supreme Court of Alabama denied certiorari in all cases in identical orders.[3]

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[1] While there are ten separate records there is a single transcript of testimony for each pair of defendants arrested in a single establishment (or five transcripts in all) of which a carbon copy appears in the record of each one of the pair.

[2] The sentencing portion of each of the ten records is identical. Record citations are indicated by the name of the defendant and the page.

[3] A sixth pair of cases, *Billups* v. *State of Alabama* and *Shuttlesworth* v. *State of Alabama*, arose in connection with the same situation, but presents somewhat different issues in that Billups and Shuttlesworth were convicted of having persuaded the petitioners bringing this petition to engage in the sit-in protests which are the subject of this petition. These two men were sentenced in the same proceeding as the instant petitioners. A separate petition for certiorari is being filed concerning Billups and Shuttlesworth.

See *infra*, pp. 15a, 22a. Hence, for convenient presentation, although each pair of cases differs somewhat, the issues are brought here by petition for writ of certiorari in a single document. Cf. *Garner* v. *Louisiana*, 7 L. ed. 2d 207, 211.

Petitioners were convicted in the Recorder's Court of the City of Birmingham for having trespassed after warning in violation of City Code of Birmingham, Alabama, §1436 (1944):

> "Sec. 1436, *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."

Upon conviction they received trials *de novo* in the Circuit Court of Jefferson County, were again adjudged guilty, and sentenced to thirty days hard labor and $100.00 fine. (Gober 8, Davis 8-9; King 8-9, Hutchinson 8-9; Parker 8-9, West 5-6; Sanders 8-9, Westmoreland 5-6; Walker 8-9, Willis 5-6.)

Each complaint charged that petitioner " . . . did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building commonly and customarily known as [the store in question] after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944." (Gober 2, Davis 2; King 2, Hutchinson 2; Parker 2, West 2; Sanders 2, Westmoreland 2; Walker 2, Willis 2.)

Gober and Davis

The *Gober* and *Davis* cases arose from a sit-in protest at Pizitz's Department Store, Birmingham. Davis, on

March 31, purchased socks, toothpaste and handkerchiefs at Pizitz's, and with Gober attempted to order at the lunch counter, but the waitress refused to approach (Gober 42, Davis 43). Without identifying himself a man informed them that Negroes could be served elsewhere in the store, but did not ask them to leave the store or where they were sitting (Gober 19-22, Davis 20-23). No sign indicated a segregation policy or that the counter was solely for whites (Gober 50, Davis 50).

That morning, Police Officer Martin testified, a superior had reported (Gober 17, Davis 18) a disturbance at Pizitz's to him; he went to the dining area, found it closed to customers, and saw two Negro males seated conversing together. No one spoke to them in Martin's hearing, neither did he speak to any person in the store (Gober 15-17, Davis 16-18). He arrested them (Gober 17-18, Davis 17-19).

The store's controller, Gottlinger (Gober 19, Davis 20), saw two Negro boys seated in the lunch area, said nothing to them, but heard one say "we should call the police" (Gober 19, Davis 20).

This witness observed an assistant to the store president speak to the boys, asking that they leave the tea room, informing them they could be served in the basement Negro restaurant because "it would be against the law to serve them there" in the tea room area (Gober 22, Davis 23).

Here, in the first case tried, petitioners tried to interrogate concerning the segregation ordinance of the City of Birmingham (Gober 22-24; Davis 23-25):

> "Mr. Hall: . . . It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the segregation law and not because it was Pizitz policy. . . .
>
> * * * * *

"Mr. Hall: As I understand it it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.

"The Court: Does the complaint cite some statute?

"Mr. Hall: Trespass after warning. If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witness' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property."

(And see Parker 25-28, West 22-25.)

The Birmingham Segregation Ordinance to which counsel referred is General City Code of Birmingham §369 (1944),[4] requiring that Negroes and whites be separated

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[4] "Sec. 369. Separation of races.

It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, §5288).

This ordinance is judicially noticeable by the Alabama courts, 7 Code of Alabama, 1940, §429(1). See *Shell Oil* v. *Edwards*, 263 Ala. 4, 9, 88 So. 2d 689 (1955); *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710 (1951). "The act approved June 18, 1943, requires that all courts of the State take judicial knowledge of the ordinances of the City of Birmingham." *Monk* v. *Birmingham*, 87 F. Supp. 538 (N. D. Ala. 1949), aff'd 185 F. 2d 859, cert. denied 341 U. S. 940. And this Court takes judicial notice

in restaurants by solid partition and that they have separate entrances. The evidence was excluded (Gober 24, Davis 25).

Gottlinger did not call the police (Gober 24, Davis 25); when asked by the police whether he witnessed the episode, petitioners already had been arrested and were being escorted out of the store by the police (Gober 24, 25; Davis 25, 26). It does not appear that any store official summoned the police or made a complaint (Gober 24, 25; Davis 25, 26).

Hutchinson and King

Police Officer Martin proceeded to Loveman's Department Store, Birmingham, along with Officer Holt who told him to accompany him on his motorcycle (Hutchinson 17, King 17). At the dining area entrance Martin found a rope tied from one post to another; a sign stated the area was closed. (*Ibid.*) He saw two Negro boys at a table but had no conversation " . . . other than to tell them that they were under arrest". (*Ibid.*)

He did not know of his own knowledge that anyone from Loveman's had asked them to leave (Hutchinson 18, King 18). Apparently at the same time Police Lt. Purvis approached Mr. Schmid, the dining area concessionnaire, stating that " . . . someone called us that you had two people in here that were trying to be served . . . " Schmid pointed to petitioners (Hutchinson 22, King 22).

The Protective Department had been notified because, as Mr. Schmid testified, "naturally", in this case, there was a "disturbance of the peace" (Hutchinson 22, King 22). The only disturbance, however, was that " . . . the waiters

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of laws which the highest court of a state may notice. *Junction R.R. Co.* v. *Ashland Bank*, 12 Wall. (U. S.) 226, 230; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 777, 778; *Adams* v. *Saenger*, 303 U. S. 59; *Owings* v. *Hull*, 9 Peters (U. S.) 607, 625.

left the floor." (*Ibid.*) Petitioners were not boisterous or disorderly (Hutchinson 28, King 28).

Mr. Kidd of the Protective Department who apparently was in charge of the situation at no time spoke to petitioners (Hutchinson 25, King 25). He merely asked the *white* persons there to leave. (*Ibid.*) Neither did he call the police, but was notifying patrons that the restaurant was closed when they arrived. So far as he knew no one called the police (Hutchinson 26, 29, King 26, 29).

Loveman's invites the general public to trade and sells general merchandise (Hutchinson 31, King 31). Its eating facilities, however, are for whites only (Hutchinson 24, King 24).

Parker and West

Police Officer Myers received a radio call from headquarters to proceed to Newberry's, Birmingham; visited the eating area and found "Two colored males [petitioners West and Parker] were sitting at the lunch counter", which was "out of the ordinary" (Parker 16-17, West 13-14). He did not speak with them nor did they converse with any store employee in his presence (Parker 17, West 14), but he arrested them for trespass after warning, it having been his "understanding" that his partner had received a complaint from a Mr. Stallings, whose capacity at the store the witness did not know, nor did the witness know whether he was employed there (Parker 18-19, West 15-16).

West had met Parker at the store where West had purchased some paper and small comic books (Parker 29, West 26). When they seated themselves some white people were eating, but petitioners were not served (Parker 30, West 27). No sign at the counter indicated service for

whites only. (*Ibid.*) (At a Negro counter elsewhere in the store a sign stated "for colored only". (Parker 24, West 21).) The officers, upon arrival, ordered the white people to get up, but all did not leave (Parker 31, West 28).

Mrs. Gibbs, the store detective, told petitioners they could be served at a Negro snack bar on the fourth floor but not where they were seated (Parker 21, West 18). (Nor could they be served at another lunch counter for whites only in the basement (Parker 22, West 19).)

Assistant Store Manager Stallings also asked petitioners to patronize the Negroes-only counter. Stallings, however, did not call the police, but was informed that "someone" did. He made no complaint to the police at the time of arrest, nor subsequently, and did not know whether anyone else did (Parker 23-24, West 20-21).

Newberry's advertises and sells merchandise to the general public. Negroes and whites shop together on the first floor (Parker 24-25, West 21-22).

Petitioners' counsel attempted to establish that the lunch counter segregation policy was the City of Birmingham's, not Newberry's (Parker 25-27, West 22-24). This line of inquiry was held incompetent (Parker 27, West 24).

Sanders and Westmoreland

Officer Caldwell of the Birmingham police was called to Kress's five and ten cent store, Birmingham, the same morning (Sanders 16, Westmoreland 13). Upon arrival he proceeded to the basement and observed "two black males" (*ibid.*) seated. He heard the manager inform petitioners they could not be served, the lights were turned out and the counter closed. Caldwell arrested them (Sanders 17, 18, Westmoreland 14, 15), but did not hear any request

that petitioners leave; no one in Kress's asked him to arrest them (*ibid.*).

When petitioners had seated themselves at a lunch counter bay the steward or manager, Pearson, closed it, informed them they could not be served, and turned out that bay's lights. They then requested service at a second bay. Pearson said: "Boys, you will have to leave because I can't serve you and the bay is closed. We are closing" (Sanders 19; Westmoreland 16). A woman already seated at the counter, however, remained after "closing" and so far as the steward knew, was not arrested and he was not called to bear witness against her (Sanders 26, Westmoreland 23).

One petitioner told him, "Well, we have our rights" (Sanders 19, Westmoreland 16); Pearson called the manager who approached the counter and asked Pearson whether he had asked them to leave. While the witness at this point stated that the manager asked them to leave the store (Sanders 20, Westmoreland 17), on cross-examination he explained:

> "Q. To leave that section, yes. In the store? A. The store was not mentioned" (Sanders 21; Westmoreland 18).

When Pearson and the manager left the bays, the police entered, asked petitioners to get up, additional police entered, and the first two officers escorted petitioners from the store. Neither Pearson nor the manager called the police, neither asked for the arrest, neither signed the complaint (Sanders 21-23, Westmoreland 18-20).

Kress's is a general department store advertising to the general public (Sanders 22, Westmoreland 19), but has no food service facilities for Negroes (Sanders 23, Westmoreland 20), although they are solicited to and may buy food

to carry out (Sanders 26, Westmoreland 23). Whites and Negroes, however, purchase from the same counters at all other departments (Sanders 24, Westmoreland 21).

Walker and Willis

The Birmingham Police Department radio dispatched Officer Casey to Woolworth's. There he observed something "unusual or out of the ordinary": two Negro males, petitioners Walker and Willis, at the lunch counter (Walker 16-18, Willis 13-15). Mrs. Evans, manager of the lunch counter, he testified, told petitioners to leave (Walker 19, Willis 16). Neither Mrs. Evans, nor anyone from the store, instructed him to arrest them, nor did she complain other than to say she wanted them to leave the counter—not the store (Walker 19, Willis 16). The police informed persons connected with the store that "they would have to come to headquarters or be contacted to sign a warrant" (Walker 19-20, Willis 16-17), but Officer Casey did not know whether such a warrant was signed (*ibid.*).

Walker and Willis had purchased various articles and then went to the counter (Walker 21, Willis 18). Walker denied that Mrs. Evans had spoken to them at all and testified that only the police asked him to leave (Walker 22, Willis 19). He testified also that white persons at the counter were served while he was seated. No white person, however, was arrested (Walker 22, Willis 19). No signs at the counter designated it for whites or Negroes (Walker 23, Willis 20).

Facts in Common

All the cases have salient facts in common. The protest demonstrations occurred in department stores open to the general public, including Negroes, but whose dining areas were segregated (Gober 48-49, Davis 49-50; Hutchinson 24,

31, King 24, 31; Parker 21, 24, 25, West 18, 21, 22; Sanders 22, 23, 24, 26, Westmoreland 19, 20, 21, 23; Walker 21; Willis 18). Nevertheless, apparently no racial signs were posted at any of the "white" dining areas (Gober 50, Davis 50; Hutchinson 28, King 28; Parker 27, West 30; Sanders 24, Westmoreland 21; Walker 23, Willis 30). In no case is there evidence that a person asking petitioners to leave identified himself as having authority to do so[5] (Gober 19-22; Davis 20-23; Hutchinson 18, 22, 25; King 18, 22, 25; Parker 23; West 20; Sanders 19, 20; Westmoreland 16, 17; Walker 18; Willis 15).

In each case the police immediately arrested petitioners without a request from anyone connected with the store (Gober 15-18, Davis 16-19; Hutchinson 18, 26, King 18, 26; Parker 23-24, West 20-21; Sanders 21-23, Westmoreland 18-20; Walker 19, Willis 16). In no case does it appear that anyone connected with the store called the police or subsequently signed a complaint, affidavit or warrant (Gober 25, 26, Davis 24, 25; Hutchinson 29, King 29; Parker 23-24, West 20-21; Sanders 21-23, Westmoreland 18-20; Walker 18, 19, 20, Willis 15, 16, 17). In no case were petitioners requested to leave the store itself as opposed to the counter area (Gober 23, Davis 22; Hutchinson 25, King 25; Parker 21, 22, West 18, 19; Sanders 20, 21, Westmoreland 17, 18; Walker 19, Willis 16). In each case petitioners were charged that they "did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes . . . after being warned not to do so" (Gober 2, Davis 2; Hutchinson 2, King 2; Parker 2, West 2; Sanders 2, Westmoreland 2; Walker 2, Willis 2).

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[5] In *Parker* and *West*, the store detective testified that he "identified" himself (Parker 18; West 21) but he nowhere testified that he identified himself as a person who had authority to ask them to leave the counter or that, in fact, he had such authority or, for that matter, as to what about himself he identified.

In each case the store management was prohibited from serving Negroes and whites in the same dining area by an Ordinance of the City of Birmingham which compelled racial segregation. See *supra* pp. 7-8, note 4, p. 7.

How the Federal Questions Were Raised and Decided Below

After conviction in the Recorders Court of the City of Birmingham petitioners appealed to the Circuit Court of the Tenth Judicial Circuit of Alabama for trials *de novo*, prior to which they filed motions to strike the complaints and demurrers, alleging that Section 1436 of the General City Code of Birmingham was unconstitutionally applied to them in that while patronizing stores open to the general public they were charged with trespass on account of race and color contrary to the equal protection and due process clauses of the Fourteenth Amendment; that Section 1436 denied due process of law secured by the Fourteenth Amendment in that it was unconstitutionally vague by not requiring that the person making the demand to depart identify his authority; that the ordinance was unconstitutionally applied in that they were engaged in sit-in demonstrations and were denied freedom of assembly and speech secured by the Fourteenth Amendment (Gober, Davis; Hutchinson, King; Parker, West; Sanders, Westmoreland; Walker, Willis, 2-4).

The motions to strike and the demurrers were overruled; exceptions were taken (Gober 7, Davis 8; Hutchinson, King 8; Parker 8, West 5; Sanders 8, Westmoreland 5; Walker 8, Willis 5).

During the trial of Gober and Davis, the first trials of the series, petitioners attempted to introduce evidence that the stores were acting in conformance to General City Code

of Birmingham §369 (1944), which requires racial segregation in establishments serving food. This line of inquiry was held incompetent (Gober 22-24, Davis 23-25).

At the close of the State's evidence, petitioners moved to exclude the evidence alleging, among other things: that the complaints were invalid because the trespasses charged were based solely on race, depriving them of due process and equal protection of the laws under the Fourteenth Amendment; that petitioners were peacefully assembled to speak and protest against the custom of racial discrimination in public establishments and were prosecuted for the purpose of denying them freedom of assembly and speech guaranteed by the Fourteenth Amendment; that the ordinance was unconstitutionally vague in not requiring that the persons requesting petitioners leave produce any evidence of authority to make the demand, whereby petitioners would be apprised of the validity of the demands to leave, thereby denying the petitioners due process of law under the Fourteenth Amendment; that all of the stores involved are vitally affected with the public interest and have assumed functions which the state would assume were they not in existence, whereby denial to petitioners of equal access to all their facilities solely because of race is a denial of due process and equal protection under the Fourteenth Amendment (Gober, Davis 5-7; Hutchinson, King 5-7; Parker 5-7, West 25 (and see Parker 5-7); Sanders 5-7; Walker 5-7, Willis 17).

The motions to exclude the evidence were overruled and exception taken (Gober, Davis 8; Hutchinson, King 8; Parker 8, West 5; Sanders 8, Westmoreland 5; Walker 8, Willis 5).

At the end of each trial petitioners moved for new trials alleging, among other things, that: the trespass ordinance was unconstitutionally applied to deprive them of free

speech, equal protection of the laws and other liberties guaranteed by the Fourteenth Amendment to the United States Constitution; that the Court erred in overruling the motions to strike the complaint, the demurrers and the motions to exclude evidence (Gober 9-11, Davis 10-12; Hutchinson, King 10-12; Parker 10, 11, West 7, 8; Sanders 10, 11, Westmoreland 7, 8; Walker 10, 11, Willis 7, 8). The motions for new trial were overruled (Gober 9, 11, Davis 9, 12; Hutchinson, King 9, 12; Parker 9, 12, West 6, 9; Sanders 9, 12, Westmoreland 6, 9; Walker 9, 12, Willis 6, 9).

Appeals were taken to the Alabama Court of Appeals and Assignments of Errors were filed against the action of the trial court in overruling the motions to strike the complaint (Assignment 1), the demurrers (Assignment 2), the motions to exclude the evidence (Assignment 3) and the motions for new trial (Assignment 4) (Gober 55, Davis 58; Hutchinson, King 41; Parker 43, West 40; Sanders 25, Westmoreland 32; Walker 35, Willis 32).

In *Gober* v. *City of Birmingham*, 6th Division 797, Ala. App. Ms. the Court of Appeals of Alabama wrote a full opinion (Gober 58) and all other cases were affirmed on the authority of Gober (Gober 58, Davis 60; Hutchinson 42, King 42; Parker 45, West 41; Sanders 36, Westmoreland 33; Walker 36, Willis 33).

While the Court held the motions to strike the complaint an improper means to raise a constitutional objection and refused to consider the demurrers, it did pass upon all of the constitutional questions raised by rejecting, adversely, on the merits, the objections to overruling the motions to exclude the evidence and the motions for new trial: "'We find no merit in appellant's Assignments numbers 3 and 4" (Gober 64).

Specifically the court held that petitioners had not been denied freedom of speech:

"Counsel has argued, among other matters, various phases of constitutional law, particularly as affected by the Fourteenth Amendment of the Federal Constitution, such as freedom of speech, in regard to which counsel stated: 'What has become known as a "sit-in" is a different, but well understood symbol, meaningful method of communication.' Counsel has also referred to cases pertaining to restrictive covenants. We consider such principles entirely inapplicable to the present case" (Gober 62).

Further, the court held the petitioners had not been denied due process and equal protection of the laws secured by the Fourteenth Amendment:

"The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was an inalienable property right possessed by the Pizitz store. The appellant would destroy this property right by attempting to misapply the Fourteenth Amendment, ignoring the provision in that Amendment that grants the right to a private property owner to the full use of his property, that is: 'Nor shall any state deprive any person of life, *liberty* or *property* without due process of law' " (Gober 63).

Moreover:

"As stated in *Williams* v. *Howard Johnson Restaurant* (C.C.A. 4), 368 Fed. 2d 845, there is an 'important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices' " (Gober 64).

Applications for rehearing before the Court of Appeals were overruled (Gober 66, Davis 61; Hutchinson, King 43; Parker 46, West 42; Sanders 37, Westmoreland 34; Walker 37, Willis 34). Writs of certiorari, sought in the Supreme Court of Alabama, were denied (Gober 72, Davis 67; Hutchinson 47, King 48; Parker 46, West 50; Sanders 42, Westmoreland 38; Walker 43, Willis 39). Applications for rehearing before the Supreme Court of Alabama were overruled (Gober 74, Davis 69; Hutchinson 49, King 50; Parker 48, West 52; Sanders 44, Westmoreland 40; Walker 45, Willis 41).

Reasons for Granting the Writ

The court below decided these cases in conflict with principles declared by this Court as is further set forth below:

I.

Petitioners were denied due process of law and equal protection of the laws by conviction of trespass for refusing to leave white dining areas where their exclusion was required by City ordinance.

Despite the fact that petitioners ostensibly were convicted for "trespass after warning" they actually were sentenced to jail and fined by Alabama for having violated the segregation policy of the City of Birmingham. This policy is expressed in the General Code of Birmingham §369 (1944) requiring all eating establishments to maintain separate facilities for Negroes and whites " . . . separated by a solid partition extending from the floor upward to a distance of seven feet or higher . . . " and requiring that separate entrances be maintained for each race. Efforts to establish by evidence that this ordinance prevented the managers of the stores from rendering the

nonsegregated service sought by petitioners was excluded at the trial in the very first of the cases tried (Gober 22-23,[6] Davis 23-24).

Moreover, corollary efforts to inquire concerning whether exclusion from the dining areas was demanded pursuant to the policy of the stores as distinct from that of the City also were rejected. Counsel for petitioners argued to the trial court:

> "The meat in this coconut is whether or not the Newberry's Department Store has complained or the City of Birmingham. It is our theory of the case it is necessary for the owner of the premises to be complaining and we are trying to find out if they have complained."

(And see the remainder of the colloquy (Parker 25-27, West 22-24).) But whether the *stores* desired not to serve was held inadmissible (*Ibid.*).

Indeed, in the *King* and *Hutchinson* cases no one connected with management had expressly asked petitioners—as distinct from white patrons—to leave the dining area. Rather, it was announced "in general terms that the tearoom was closed and for everyone please to leave" (King 20, Hutchinson 20). Yet, twenty-five "whites were still sitting there when the two Negroes were there, when the police officers came" (King 23, Hutchinson 23). But, while petitioners were arrested summarily, it does not appear that any of the whites were arrested (*Ibid.*). White persons merely were requested to leave.

Further confirmation that the policy of enforcing segregation was the City's, appears from how the arrests were made. The police proceeded to the stores in question and

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[6] See pp. 6-8, *supra*.

without requests to arrest by the management (See "Facts in Common," *supra* p. 12), immediately arrested petitioners. There is no evidence that anyone connected with the stores called the police (*Ibid.*). And petitioners were arrested even when police had no knowledge that anyone had refused to serve (King 23, Hutchinson 23) or had asked them to leave the dining area (Gober 15-17, Davis 16-18; Parker 16-17, West 13-14). The conduct of the stores in these circumstances gives rise to an inference that the store managers were willing to tolerate the demonstrations. As Mr. Justice Harlan has written. There was:

> "... the reasonable inference ... that the management did not want to risk losing Negro patronage in the stores by requesting these petitioners to leave the 'white' lunch counters, preferring to rely on the hope that the irritations of white customers or the force of custom would drive them away from the counters. This view seems the more probable in circumstances when, as here, the 'sitters' behaviour was entirely quiet and courteous, and, for all we know, the counters may have been only sparsely, if to any extent, occupied by white persons." *Garner* v. *Louisiana*, 30 U. S. L. Week 4070, 4082 (Mr. Justice Harlan concurring).

If the stores were willing to cope with the controversy within the realm of social and economic give and take, Birmingham had no constitutional authority to intervene as an enforcer of segregation.

The discriminatory practices in these stores, the demands that petitioners leave and their arrests and convictions, result, therefore, directly from the formally enacted policy of the City of Birmingham, Alabama, and not (so far as this record indicates) from any individual or corporate decision or preference of the management of the

stores to exclude Negroes from the lunch counters. Whatever the choice of the property owners may have been, here the City made the choice to exclude petitioners from the property through its segregation ordinance. This city segregation policy was enforced by petitioners' arrests, convictions, and sentences of imprisonment in the Alabama courts.

The Alabama Court of Appeals dismisses reference to the city segregation ordinance by stating "there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property" (Gober 63). (All other convictions were affirmed on authority of *Gober*.) But the Constitution forbids "sophisticated as well as simple-minded modes of discrimination" *Lane* v. *Wilson*, 307 U.S. 268, 275.

By enacting, first, that persons who remain in a restaurant when the owner demands that they leave are "trespassers," and then enacting that restaurateurs may not permit Negroes to remain in white restaurants, the City has very clearly made it a crime (a trespass) for a Negro to remain in a white restaurant.[7]

Exclusion by the trial court of evidence concerning the ordinance and the policy of the City of Birmingham does not negate the fact that Birmingham is enforcing segregation. By Alabama statute all courts of the State are "required" to take judicial notice of the ordinance of the City

[7] Racial segregation imposed under another name often has been condemned by this Court. *Guinn* v. *U. S.*, 238 U.S. 347; *Lane* v. *Wilson, supra; Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) aff'd 336 U.S. 933; and see *Louisiana State University and A. & M. College* v. *Ludley*, 252 F. 2d 372 (5th Cir. 1958), cert. denied 358 U.S. 819.

of Birmingham. This Court can and will judicially notice matter that the courts below could notice.[8]

The case thus presents a plain conflict with numerous prior decisions of this Court invalidating state efforts to require racial segregation. *Buchanan* v. *Warley*, 245 U.S. 60; *Brown* v. *Board of Education*, 347 U.S. 483; *Gayle* v. *Browder*, 352 U.S. 903, aff'g 142 F. Supp. 707, 712 (M.D. Ala. 1956); *Holmes* v. *City of Atlanta*, 350 U.S. 879; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U.S. 877; *State Athletic Commission* v. *Dorsey*, 359 U.S. 533; Cf. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. Note the dissenting opinion of Judges Bazelon and Edgerton in *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 843 (D.C. Cir. 1961) (dealing primarily with the related issue of whether a proprietor excluding a Negro under an erroneous belief that this was required by state statute was liable for damages under the Civil Rights Acts; the majority applied the equitable abstention doctrine). Indeed, *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (4th Cir. 1959), relied upon by the Alabama Court of Appeals below, indicated that racial segregation in a restaurant "in obedience to some positive provision of state law" would be a violation of the Fourteenth Amendment. See also *Boman* v. *Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961).

[8] See Note 4, *supra*.

II.

Petitioners were denied due process and equal protection by convictions for trespass for refusal to leave whites-only dining areas of department stores in which all persons are otherwise served without discrimination.

Even should the convictions be viewed as enforcing an alleged "inalienable property right" (Opinion of the Alabama Court of Appeals, Gober 63) to order customers about within a store the judgments below conflict with principles declared by this Court.

The state by arrest and criminal conviction has "place[d] its authority behind discriminatory treatment based solely on color . . ." Mr. Justice Frankfurter dissenting in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 727, by enforcing a policy of deploying customers within a store on the basis of race. This appears immediately from the complaints, all of which describe the premises upon which petitioners allegedly trespassed as the "*area* used for eating, drinking and dining purposes and located within the building commonly and customarily known as . . ." (emphasis supplied). (See, e.g., Gober 2.) No question arose about the legality of petitioners' presence within the stores —indeed, their patronage was actively solicited—but only whether for reasons of race they might be convicted for failure to move from particular portions of each store where they sought sit-down food service. And when petitioners were asked to leave, they were rejected from the dining areas only—not the stores. Moreover, in the cases of Hutchinson and King (Hutchinson 25, King 25) they were not even asked to leave the dining areas. We have here, therefore, the state racially re-arranging by means of a trespass ordinance the customers within a single store.

Petitioners submit that the state's interest in maintaining such a "property" right is hardly sufficient to negate the well-established principle that the Fourteenth Amendment forbids government to enforce racial discrimination.

That private property may be involved hardly settles a claim that Fourteenth Amendment rights have been denied. *Marsh* v. *Alabama*, 326 U.S. 501, 506; *Buchanan* v. *Warley*, 245 U.S. 60, 74; *United States* v. *Willow River Power Co* 324 U.S. 499, 510; *Shelley* v. *Kraemer*, 334 U.S. 1. The stores were open generally to the public, advertised, and solicited it to purchase generally. The stores were "part of the public life" of the community. *Garner* v. *Louisiana*, *supra* at 7 L. ed. 2d 222 (Mr. Justice Douglas concurring). Negroes and whites were served without distinction except at lunch counters where Negroes were served only in separate sections or were permitted to purchase food to take out. None of the lunch counters contained signs excluding Negroes. All were integral parts of the establishments into which petitioners were invited. Petitioners sought to use the dining areas in their usual, intended manner. *None of the dining sections were treated by the proprietors themselves as private* in any sense except that upon being seated Negroes were denied service. Thus, the "property" right which the state has enforced is a "right" to discriminate among patrons on the basis of race in one particular aspect of the service of a single establishment.

But beyond this, the record demonstrates that the alleged property right being enforced was not in reality being asserted by private proprietors—it was a manifestation of state policy. This policy is, first of all and most clearly, expressed in the Birmingham restaurant segregation Ordinance §369. It is manifested also in a massive statutory and state constitutional structure which impresses segre-

gation on innumerable activities of all of the citizens of Alabama.

See, Alabama Constitution §111 amending §256 (nothing in the Constitution to be construed as creating a right to public education; legislature authorized to provide for education taking into account the preservation of "peace and order" and may authorize parents to send their children to schools "for their own race"). Code of Alabama Title 1 §2 (defines "Negro" and "Mulatto"); Title 52 §24 (authorizes appointment of an Advisory Board for Negro Educational Institutions); Title 52 §§452-455 (maintenance of Alabama A. & M. Institute for Negroes); Title 52 §455(1)-(4) (maintenance of Tuskegee Institute for Negroes only); Title 45 §248 (schools for the mentally deficient to be built taking into account separation of the races); Title 45 §4 (prisoners in tubercular hospitals to be separated on basis of race); Title 14 §§360-361 (marriage, adultery and fornication between Negroes and whites a felony; officer issuing license for such a marriage commits misdemeanor). Alabama Constitution §102 (legislature may never permit interracial marriages). Title 40 §189(19) (white women may not act as nurses in any public or private hospital where Negro men are patients); Title 44 §10 (county homes for the poor to be segregated); Title 51 §244 (a breakdown of the poll tax on the basis of race must be taken); Title 45 §§121-123, 52, 183 (white and Negro prisoners must be separated); Title 48 §§186, 196-197, 464 (Negroes and whites must be separated in railroad coaches and waiting rooms); Title 48 §301 (31a, b, c) (Negroes and whites to be separated on intrastate buses). See *Browder* v. *Gayle*, 352 U.S. 903 (1956).

Segregation is all of a piece. When the state decrees and enforces it at myriad points it hardly can claim that a proprietor who follows massive governmental policy in

racially segregating customers is exercising rights of "private property."

Petitioners submit that it is "irony amounting to grave injustice that in one part of a single building . . . all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race. . . ." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 724. While the excised language (replaced by dots) in the quotation from *Burton* refers to a building "erected and maintained with public funds by an agency of the States," 365 U. S. 715, at 724, the legal significance of the omitted phrase, petitioners submit, was to supply the Fourteenth Amendment element of state action. In *Burton*, where, petitioner was neither arrested nor prosecuted, this element was furnished by the facts that, *inter alia*, "the authority, and through it the state has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. 715, at 725. In the instant suit state participation bites more deeply for petitioners have by Alabama courts been branded criminals and relegated to "30 days hard labor for the City."

The "property" right (racial discrimination in accordance with state custom supported by state law) within a single store open to the public which Alabama seeks to preserve by applying the Birmingham trespass ordinance, is so narrow as to not deserve—in face of the Fourteenth Amendment—state protection. Indeed, is the kind of "property right" which many states have taken away without, this Court has held, denying due process of law. *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 93, 94. It is not the sort of "property" right involving considerations entitled to high constitutional protection as, for example, the right of privacy treated in *Mapp* v. *Ohio*, 367 U.S. 643 and see *Poe*

v. *Ullman*, 367 U.S. 497. Cf. *Frank* v. *Maryland*, 359 U.S. 360. Here, indeed, it is a case where the right of private property in a store, part of the public life of the community, should be "limited by the neighborhood of principles of policy which are other than those on which the particular right is founded. . . ." *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 356. These principles of policy are the principles of the Fourteenth Amendment which forbid the state to enforce racial discrimination. To make policemen ushers within public stores, whose duties are to direct the respective races here and there under threat of jail sentence, petitioners submit, far exceeds anything the Fourteenth Amendment ever has permitted.

III.

The convictions deny due process of law in that they rest on an ordinance which fails to specify that petitioners should have obeyed commands to depart given by persons who did not establish authority to issue such orders at the time given.

In the courts below petitioners asserted that the ordinance in question as applied to them denied due process of law secured by the Fourteenth Amendment to the Constitution of the United States in that it did not require that the persons requesting them to leave the dining areas established or, indeed, asserted their authority to make the demands. In none of the ten records before this court did the persons who demanded that petitioners leave, first inform petitioners or demonstrate to them that they had authority to request that the petitioners leave the areas in question. Only in one pair of cases (Parker 18, West 21) did the witness say that he "identified" himself. Yet there was no evidence that he claimed authority to order petitioners out of the dining area, or indeed, that the witness

possessed such authority. No one ordinarily may be expected to assume that one who tells him to leave a public place, into which the proprietor invited him and in which he has traded, is authorized to utter such an order when no claim of such authority is made.

This is especially true in the case of a Negro seating himself in a white dining area in Birmingham, Alabama—obviously a matter of controversy and on which any stranger might be expected to volunteer strong views. If the statute in question is interpreted to mean that one must leave a public place under penalty of being held a criminal when ordered to do so by a person who later turns out to have been in authority without a claim of authority at the time, it means as a practical matter that one must depart from a public place whenever told to do so by anyone; the alternative is to risk fine or imprisonment. Such a rule might be held a denial of due process. Cf. *Lambert* v. *California*, 355 U.S. 225. But if such is the rule the statute gives no fair warning; absent such notice petitioners surely were entitled to assume that one may go about a public place under necessity to observe orders only from those who claim with some definiteness the right to give them.

Indeed, as a matter of due process of law, if it is the rule one must obey all orders of strangers to leave public places under penalty of criminal conviction if one uttering the order later turns out to have had authority, petitioners are entitled to more warning of its harshness than the ordinance's text affirmed. *Connally* v. *General Construction Co.*, 269 U.S. 385; *Lanzetta* v. *New Jersey*, 306 U.S. 451. Otherwise many persons—like these petitioners—may be held guilty of crime without having intended to do wrong. This Court has said however, that:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or

> transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morrissette* v. *U. S.*, 342 U.S. 246, 250.

Morrissette, of course, involved a federal statute as treated in the federal courts. But it expresses the fundamental view that *scienter* ought generally to be an element in criminality. See Sayre, *Public Welfare Offenses*, 33 Columbia L. Rev. 55, 55-6 (1933). The pervasive character of *scienter* as an element of crime makes it clear that a general statute like the ordinance now in question, in failing to lay down a *scienter* requirement, gives no adequate warning of an absolute liability. Trespass statutes like the one at bar are quite different from "public welfare statutes" in which an absolute liability rule is not unusual. See *Morrissette* v. *United States*, *supra*, 342 U.S. at 252-260.

Indeed, the ordinance in question is significantly different from Code of Alabama, Title 14, §426, which at least exculpates those who enter with "legal cause or good excuse" a phrase missing from the Birmingham ordinance. Cf. *Central Iron Co.* v. *Wright*, 20 Ala. App. 82, 101 So. 815; *McCord* v. *State*, 79 Ala. 269; American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comment.

On the other hand however, if Alabama were to read a *scienter* provision into this ordinance for the first time—which it has failed to do although the issue was squarely presented in these ten cases—the lack of the necessary element of guilt, notice of authority, patent on the face of all ten records, would require reversal under authority of *Garner* v. *Louisiana*, *supra*; *Thompson* v. *City of Louisville*, 362 U.S. 199.

IV.

The decision below conflicts with decisions of this Court securing the right of freedom of expression under the Fourteenth Amendment to the Constitution of the United States.

Petitioners were engaged in the exercise of free expression, by verbal requests to the management for service, and nonverbal requests to the management for service, and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 7 L. ed. 2d at 235-36. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U.S. 616, 630, Holmes, *J.*, dissenting), within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U.S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U.S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 633-634 (flag salute); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (freedom of association).

Questions concerning free speech expression are not resolved merely by reference to the fact that private prop-

erty is involved. The Fourteenth Amendment right to free expression on private property takes contour from the circumstances, in part determined by the owner's privacy, his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U.S. 622, the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publishers' right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U.S. 141 where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest are to be taken into account.

In this constitutional context it is crucial, therefore, that the stores implicitly consented to the continuance of the protest and did not seek intervention of the criminal law. For, this case is like *Garner* v. *Louisiana*, *supra*, where Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. In none of the cases at bar did anyone other than the police request petitioners to leave the store. In one pair of cases there was not even a request to leave the dining area. The pattern of police action, obviously, was to arrest Negroes in white dining areas. In no case does it appear that anyone connected with the store called the police or subsequently signed an affidavit or complaint. In each case the police officer proceeded immediately to arrest the petitioners without any request to do so on the part of anyone connected with the store.

In such circumstances, petitioners' arrest must be seen as state interference in a dispute over segregation at these

counters and tables, a dispute being resolved by persuasion and pressure in a context of economic and social struggle between contending private interests. The Court has ruled that judicial sanctions may not be interposed to discriminate against a party to such a conflict. *Thornhill* v. *Alabama, supra; San Diego Bldg. Trades Council* v. *Garmon*, 349 U.S. 236.

But even to the extent that the stores may have acquiesced in the police action a determination of free expression rights still requires considering the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action supports. *Marsh* v. *Alabama*, 326 U.S. 501.

In *Marsh*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D.C. Cir. 1956), reversed on other grounds, 357 U.S. 357, and compare the cases mentioned above with *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U.S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86 N.Y.S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those whose use it." See also *Freeman* v. *Retail Clerks Union*,

Washington Superior Court, 45 Lab. Rel. Ret. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by these trespass prosecutions is support of the property owner's discrimination in conformity to the State's segregation custom and policy and the express terms of the City Ordinance. This is all that the property owner can be found to have sought.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States*, 249 U.S. 47, 52. The only "substantive evil" sought to be prevented by these trespass prosecutions is the stifling of protest against the elimination of racial discrimination, but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. See *Cooper* v. *Aaron*, 358 U.S. 1; *Terminiello* v. *Chicago*, 337 U.S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Circuit, 1947), cert. denied 332 U.S. 851.

Moreover, if free speech under these circumstances is to be curtailed, the least one has a right to expect is reasonable notice in the ordinance under which convictions are obtained, to that effect. Here, absent a statutory provision that the person giving the "warning" have authority to do so, and that he be required to communicate that authority to the person asked to leave, petitioners were convicted on records barren of evidence that such authoritative notice was given. In effect they have been convicted of crime for refusing to cease their protests at the request of persons, who for all the records show, were strangers

at the time. The stifling effect of such a rule on free speech is obvious; under the Fourteenth Amendment, therefore, these convictions are doubly defective in curtailing First Amendment rights. See *Wiemqn* v. *Updegraff*, 344 U.S. 183; *Smith* v. *California*, 361 U.S. 147.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX

Judgment Entry in Gober Case

At a regular, adjourned, or special session of the Tenth Judicial Circuit of Alabama . . .

THE STATE

CITY OF BIRMINGHAM

—VS.—

JAMES GOBER

Appealed from Recorder's Court
(Trespass After Warning)

HONORABLE GEO. LEWIS BAILES, *Judge Presiding*

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for this plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered

by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said James Gober, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said James Gober, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to forty-eight and 75/100 ($48.75) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library

Tax, $1.00, leaving forty-four and 75/100 ($44.75) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty days, at the rate of 75 cents per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

Opinion of Harwood, Presiding Judge

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61
6 Div. 797

JAMES GOBER

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

HARWOOD, *Presiding Judge*

This appellant was first convicted in the Recorder's Court of the City of Birmingham for violating Section 1436 of the City Code of Birmingham, Alabama, 1944.

Section 1436, *supra,* is as follows:

> "Sec. 1436, *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall, on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."

On his conviction in the Recorder's Court, the appellant perfected an appeal to the Circuit Court of Jefferson County, where he was again adjudged guilty, and punishment was imposed.

Opinion of Harwood, Presiding Judge

The complaint filed in the Circuit Court reads:

> "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that James Gober, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as Pizitz Department Store, located at 1821 2nd Avenue, North, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944."

The evidence presented by the City in the trial below tends to show that this appellant, together with one James Davis, went to the cafeteria or lunch room in the Pizitz store and seated themselves at a table. According to the appellant, they could not obtain service from the waitresses.

Shortly, Dick Pizitz, assistant to the President of Pizitz, arrived and asked the appellant and Davis to leave, and told them they could be served downstairs. The appellant and Davis refused to leave. Either the appellant or Davis, upon refusing to leave, suggested that the police be called.

In response to instructions from a superior officer, a police officer of the City of Birmingham went to the restaurant. He found the appellant and Davis still seated at a table, and placed both under arrest.

This being an appeal from a conviction for violating a city ordinance, it is quasi criminal in nature, and subject to rules governing civil appeals. Accordingly we will limit our review to errors assigned and argued in appellant's brief. *Fiorella* v. *City of Birmingham*, 35 Ala. App. 384,

48 So. 2d 761; cert. den. 254 Ala. 515, 48 So. 2d 768; cert. den. 71 S. Ct. 506, 340 U. S. 942, 95 L. Ed. 680; *Ellis* v. *City of Sylacauga*, 36 Ala. App. 687, 63 So. 2d 33; *Parks* v. *City of Montgomery*, 38 Ala. App. 681, 92 So. 2d 683.

In the proceedings below the appellant filed a motion to strike the complaint, which motion was overruled. This ruling is asserted as error in Assignment of Error No. 1.

A motion to strike is not the proper method of testing the sufficiency of a complaint. *Taylor* v. *City of Birmingham*, 35 Ala. App. 133, 45 So. 2d 53; *Byrum* v. *Pharo*, 240 Ala. 564, 200 So. 622. Assignment of Error No. 1 is therefore without merit.

Appellant's Assignment of Error No. 2 avers that the court erred in overruling his demurrer to the complaint.

Ground 1 of the demurrer asserts that the complaint does not charge the defendant with any offense under the laws or Constitution of the State of Alabama; Ground 2, that the complaint is insufficient to support a prosecution in that no offense is charged corrigible by the court; Ground 3, that the complaint is so vague and uncertain as to not apprise the defendant of what he is called upon to defend.

Pretermitting other possible defects, it is clear that all of the grounds are general in nature, and in no wise point out any specific defect in the complaint.

For this reason alone the lower court was justified in refusing to examine the complaint for defects therein, and could properly overrule the demurrer, *Oliveri* v. *State*, 13 Ala. App. 348, 69 So. 357, and a trial court will not be put in error for overruling a demurrer based on general grounds which are not sufficiently specific to point out an alleged defect in the pleading. *Gabiness* v. *City of Tusca-*

loosa, 39 Ala. App. 538, 104 So. 778; *Sarber* v. *Hollon*, 265 Ala. 323, 91 So. 2d 229.

In brief counsel for appellant argues that the complaint is insufficient in not setting forth by whom the appellant was warned to leave the premises.

No ground of the demurrer raised this point in the court below. Even if the complaint be defective in this regard, a premise we do not accept, the defect was amendable. Sec. 238, Tit. 7, Code of Alabama 1940, provides:

> "Either before or after judgment on demurrer, the court must permit an amendment of the pleadings; * * *"

This section is broad and comprehends all pleadings except indictments, and authorizes amendment of complaints in prosecutions for violation of city ordinances, as though it were a complaint in a civil action. *Thomas* v. *State*, 58 Ala. 365.

The alleged defect not having been in any wise raised in the court below, and not pointed out by demurrer, is not available on appeal, and will not be considered. *McElhaney* v. *Singleton*, 270 Ala. 162, 117 So. 2d 376; *Campbell* v. *Jackson*, 257 Ala. 618, 60 So. 2d 252.

Grounds 4, 5, 6, 7 and 8 assert the invalidity of the ordinance (Sec. 1436, *supra*) on various constitutional grounds, *as applied to this defendant*. (Italics ours.) No unconstitutional application of the ordinance to this defendant appears from any of the pleading. Such unconstitutional application would be a matter of evidence. These grounds, setting up a speaking demurrer, necessitated an overruling of the demurrer in this aspect. *Brown* v. *City of Fairhope*, 265 Ala. 596, 93 So. 2d 419; *Kalas* v. *McMahon*, 36 Ala. App. 238, 54 So. 2d 322; *United States Fidelity*

and Guaranty Co. v. *Town of Dothan*, 174 Ala. 480, 56 So. 953.

Appellant's Assignments of Error numbers 3 and 4, respectively, are to the effect that the lower court erred in overruling appellant's motion to exclude the evidence, and in overruling appellant's motion for a new trial. Counsel has made no attempt to separate these assignments for argument in brief, and we will treat them jointly, though we wish to observe that the grounds supporting the motion to exclude the evidence are faulty in several aspects, particularly in setting forth erroneous legal principles as their bases. All grounds specified in support of the motion were defective, and the court properly overruled the motion.

Counsel has argued among other matters, various phases of constitutional law, particularly as affected by the Fourteenth Amendment of the Federal Constitution, such as freedom of speech, in regard to which counsel state: "What has become known as a 'sit-in' is a different, but well understood symbol, meaningful method of communication." Counsel has also referred to cases pertaining to restrictive covenants. We consider such principles entirely inapplicable to the present case.

Counsel also state in brief that " * * * The prosecution adduced no evidence to prove that they had no such constitutional right * * *" that is, to remain in the restaurant after having been requested to leave. In this, counsel are under a misapprehension as to the burden to be carried by the defense. The City having presented evidence tending to show that the appellant remained upon private premises after having been warned by an officer of the company owner to leave, it was under no burden to go further and offer evidence that the appellant's act was done without lawful excuse. This was defensive matter,

the proof of which rested upon the appellant unless the evidence which proved the act also proved the excuse. *Owens* v. *State*, 74 Ala. 401.

As we interpret the argument of counsel for appellant, its tenor may well be illustrated by the following quotations from the brief:

> "Due process and equal protection demand that a Negro be accorded the right to sit at eating counters of privately owned businesses, if he has been a customer in other departments of the store.
>
> * * * * * *
>
> "That the premises were privately owned should not detract from the high constitutional position which such free expression deserves."

We know of no warrant in law validating the principles asserted by counsel.

As aptly stated in *Browder* v. *Gayle*, 142 F. Supp. 707:

> "In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U. S. 33 S. Ct. 18, 27 L. Ed. 835. Indeed we think that such liberty is guaranteed by the due process of that Amendment."

Even so, there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property.

The Pizitz Department Store is a private business—a private enterprise. It has no connection with any governmental agency, federal, State, County or city.

The appellant entered upon the privately owned and operated premises of the store as a licensee by implied invitation. He had no intetest in the premises. While a distinction exists between a licensee and an invitee insofar as liability for negligence on the part of the owner of the premises is concerned, the principles governing appellant's conduct in the present consideration must be governed by the rules pertaining to licensees, for in general, that is the position he occupied even though on the premises by an implied invitation.

The Pizitz store, being the owner of its premises, had a full right to limit the use of its own premises as it saw fit.

By its own choice it could limit the use of any part of its premises. It exercised this right to limit the use of its restaurant.

In the absence of statute, a restaurant owner may accept or reject customers on purely personal choice. *Nance* v. *Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773; *Noble* v. *Higgins*, 158 N. Y. S. 867, 95 Misc. 328.

The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was an inalienable property right possessed by the Pizitz store. The appellant would destroy this property right by attempting to misapply the Fourteenth Amendment, ignoring the provision in that Amendment that grants the right to a private property owner to the full use of his property, that is: "Nor shall any state deprive any person of life, *liberty, or property*, without due process of law." (Italics ours.)

As stated in *Williams* v. *Howard Johnson Restaurant* (C. C. A. 4), 368 Fed. 2d 845, there is an "important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices."

It is fundamental, and requires no citation of authority, that the grantor of a license, which has not become coupled with an interest, may revoke the license at will.

When the appellant was requested to leave the restaurant by an official of the Pizitz store, and refused to leave, his status as an invited licensee was destroyed, and he was thereafter on the premises as a trespasser. As stated in *Martin* v. *City of Struthers*, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off."

Boynton v. *Virginia*, 81 S. Ct. 132, relied on by the appellant, was decided on the basis of the Federal Interstate Commerce Act, and is to the effect that said act prohibits the exclusion of Negroes from restaurants operated or controlled by an interstate carrier as a part of its business. This doctrine cannot be said to create a constitutional right to trespass on private property, regardless of race.

Likewise, we find the doctrine of *Marsh* v. *State of Alabama*, 326 U. S. 501, 90 L. Ed. 265, inapplicable to the present case. The Marsh case, supra, concerned the right to distribute religious pamphlets on the sidewalk of a company owned town. As stated by the court, this town

though owned by a company, had "all the characteristics of any other American town" insofar as municipal functions were concerned, and therefore should be subjected to constitutional limitations imposed on regular public municipalities. Here we are concerned with a private owner in the use of his private property.

We find no merit in appellant's Assignments numbers 3 and 4.

Assignment of Error number 5 relates to a ruling concerning the admission of certain evidence. Counsel has not argued this assignment in brief, and pretermit consideration thereof.

AFFIRMED.

Order of Affirmance in Gober Case

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 797

JAMES GOBER

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

November 2, 1960
CERTIFICATE FILED

January 30, 1961
TRANSCRIPT FILED

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

Order Denying Application for Rehearing in Gober Case

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 797

JAMES GOBER

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to grant Appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on, to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
PETER A. HALL
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Attorneys for Appellant

June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled. Per Curiam.

Order Denying Petition for Writ of Certiorari to the Court of Appeals in Gober Case

THE SUPREME COURT OF ALABAMA

Thursday, September 14, 1961

THE COURT MET IN SPECIAL SESSION PURSUANT TO ADJOURNMENT

Present: All the Justices

6th Div. 762

EX PARTE: JAMES GOBER

Petitioner

(RE: JAMES GOBER

—VS.—

CITY OF BIRMINGHAM)

JEFFERSON CIRCUIT COURT

Comes the Petitioner in the above styled cause and the Petition for Writ of Certiorari to the Court of Appeals being Submitted on Briefs and duly examined and understood by the Court,

IT IS ORDERED that the Writ of Certiorari be and the same is hereby denied and the petition dismissed at the cost of the petitioner for which cost let execution issue.

LIVINGSTON, *C.J.*, SIMPSON, GOODWYN and COLEMAN, *JJ.*, Concur

Order Denying Rehearing in Gober Case

THE SUPREME COURT OF ALABAMA

Thursday, November 2, 1961

THE COURT MET PURSUANT TO ADJOURNMENT

Present: All the Justices

6th Div. 762

EX PARTE: JAMES GOBER

Petitioner

(RE: JAMES GOBER

—VS.—

CITY OF BIRMINGHAM)

JEFFERSON CIRCUIT COURT

IT IS HEREBY ORDERED that the application for rehearing filed in the above cause by the petitioner on September 28, 1961, be and the same is hereby overruled.

(LIVINGSTON, *C.J.*, SIMPSON and COLEMAN, *JJ.*, concur.)

Judgment Entry in Roosevelt Westmoreland Case*

At a regular, adjourned, or special session of the Tenth Judicial Circuit of Alabama . . .

THE STATE

CITY OF BIRMINGHAM

—VS.—

ROOSEVELT WESTMORELAND

Appealed from Recorder's Court
(Trespass After Warning)

HONORABLE GEO. LEWIS BAILES, *Judge Presiding*

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said de-

* The Judgment Entry, Order of Affirmance, Order Denying Rehearing, Order Denying Petition for Writ of Certiorari, and Order Denying Rehearing of Petition for Writ of Certiorari are without material difference in all of the other cases except *Gober*, as to which see pp. 1a to 16a *supra*.

murrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Roosevelt Westmoreland, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Roosevelt Westmoreland, perform additional hard labor for the City of Birmingham

for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to fifty-two and 55/100 ($52.55) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-eight and 55/100 ($48.55) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty-five days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

Order of Affirmance in Roosevelt Westmoreland Case*

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 805

ROOSEVELT WESTMORELAND

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

November 2, 1960
CERTIFICATE FILED

January 30, 1961
TRANSCRIPT FILED

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court, there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

* See note p. 17a, *supra*.

Order Denying Rehearing in Roosevelt Westmoreland Case*

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 805

ROOSEVELT WESTMORELAND

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to grant appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on, to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
PETER A. HALL
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Attorneys for Appellant

June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled.

Per Curiam.

* See note p. 17a, *supra*.

Order Denying Petition for Writ of Certiorari in Roosevelt Westmoreland Case*

THE SUPREME COURT OF ALABAMA

Thursday, September 14, 1961

THE COURT MET IN SPECIAL SESSION PURSUANT TO ADJOURNMENT

Present: All the Justices

6th Div. 753

EX PARTE: ROOSEVELT WESTMORELAND

Petitioner

(RE: ROOSEVELT WESTMORELAND

—VS.—

CITY OF BIRMINGHAM)

JEFFERSON CIRCUIT COURT

Comes the Petitioner in the above styled cause and the Petition for Writ of Certiorari to the Court of Appeals being Submitted on Briefs and duly examined and understood by the Court,

IT IS ORDERED that the Writ of Certiorari be and the the same is hereby denied and the petition dismissed at the cost of the petitioner for which cost let execution issue.

LIVINGSTON, *C.J.*, SIMPSON, GOODWYN and COLEMAN, *JJ.*, Concur

* See note p. 17a, *supra*.

Order Denying Rehearing in Roosevelt Westmoreland Case*

THE SUPREME COURT OF ALABAMA

Thursday, November 2, 1961

THE COURT MET PURSUANT TO ADJOURNMENT

Present: All the Justices

6th Div. 753

EX PARTE: ROOSEVELT WESTMORELAND

Petitioner

(RE: ROOSEVELT WESTMORELAND

—VS.—

CITY OF BIRMINGHAM)

JEFFERSON CIRCUIT COURT

IT IS HEREBY ORDERED that the application for rehearing filed in the above cause by the petitioner on September 28, 1961, be and the same is hereby overruled.

(LIVINGSTON, *C.J.*, SIMPSON and COLEMAN, *JJ.*, concur.)

* See note p. 17a, *supra*.